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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ARTHUR MOATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Arthur Moates, by his attorney, petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

QUESTION PRESENTED

1. Whether the court committed reversible error when it allowed the government to present vital testimony from a police officer that he had elicited from a co-defendant,

prior to any arrest, about petitioner's actions as the head of the cocaine operation, said statements having been made to the officer in his office while the declarant was a paid informant seeking the release of a boyfriend from jail.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is unreported. The jurisdiction of the court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecution, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . .

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STATEMENT OF THE CASE

On July 24, 1986, a jury, sitting in Greenville, South Carolina, found petitioner Arthur Moates and four (4) others guilty of numerous counts of conspiracy and narcotic distribution counts.[1] The trial followed an extensive

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[1] In violation of Title 21, U.S.C. Section 841(a)(1), 843(b)(c), 841(a)(1) and 18 U.S.C. Section 2.

investigation in which a court-ordered wire tap was utilized on a phone located at petitioner's place of business. Following certain wire interceptions the Greenville City Police seized one kilogram of cocaine on March 28, 1986. The bulk of the government's case was the wiretaps, an expert to interpret what the declarants were talking about (in code) and evidence of surveillance and the seizure of cocaine. At no time did petitioner ever mention drugs or get caught handling drugs.

The issue presented here is simple. Greenville City Detective Harold Atkins, Jr., the equivalent of the case agent, testified as to his investigation and then as an expert on the de-coding of the wiretap conversations. He was allowed to *testify* at trial as to meetings he had with co-defendant Sophia Floyd (who was on trial with Moates and others) in mid-October 1985 at his office. Atkins testified that Ms. Floyd "was wanting to work a deal to cooperate with (the police) in an effort to help her boyfriend (in an unrelated case) and the paramour of her sister (Benae Floyd, also a defendant tried with petitioner) who was at that time serving time for a drug related charge." Atkins told the jury, over defense objections, about his conversations with co-defendant Floyd. Those conversations specified her drug deals in the past and the relationship of her criminal acts to the activities of petitioner Moates and co-defendant Richard Neely.[2] Some background that demonstrates the trial court's advance knowledge of the impropriety comes from a *Franks* v. *Delaware* hearing, 438 U.S. 154 (1978).

Special Agent Anthony Durante testified that Sophia Floyd had been a paid Greenville County informant since

[2] The Fourth Circuit opinion reversed and remanded Neely's conviction for a new trial and determined error as to Moates was harmless due to the amount of evidence against him. (See (A-1), the unpublished opinion.)

October 1985 and that she had provided information about the Broad Street area (and Moates' operation). The wiretap evidence then showed corroboration of that hearsay by demonstrating conversations between Moates and Ms. Floyd. (Trial Tr. 37-46) A pen register showed frequent calls between Moates and Neely. Durante testified that he had been aware (as a narcotics officer) of Moates for one and a half years and Neely for three and one half to four years.

At trial Agent Durante testified, before the jury, that "I received some information about an operation with the Greenville Police Department that a group of individuals from Miami were frequenting that area and distributing kilos of cocaine. . . We attempted undercover police purchases, the use of confidential informants, physical surveillance and other investigative techniques." (Trial Tr. I, 18-20) Immediately following said improper testimony, Agent Durante identified a photograph of the service station of Petitioner Moates, taken on surveillance. Next evidence was introduced of hearsay, statements made by a courier arrested in Atlanta, George *re* delivering five (5) kilos to a black man in Greenville. Petitioner Moates was subsequently described as that black man. Thereafter, the courier, Rafael Galano, testified as a government witness, sentenced to four years. He stated that his supplier was a Latin man named Nelson Aguilar. He described Petitioner and visits to his service station (the one identified by Agent Durante from the surveillance photograph) and identified Moates as the man he delivered cocaine to in 1983 or '84 at the LaQuinta Motel in Woodruff, South Carolina. The court allowed the evidence over objection, under Rule 404(b), *Federal Rules of Evidence.* None of Galano's testimony was corroborated. In fact he wore a wire, undercover, and talked to Petitioner, but nothing taped related to a drug deal, past, present or future, and the conversa-

tion supported petitioner's position that Galano was lying.[3]

Galano then described a deal at the LaQuinta Motel where he met co-defendant Sophia Floyd. Galano admitted that he did not deliver cocaine to Moates and that the March 1986 proposed deal was never consumated. (Trial Tr. I, pp. 62-63)

Paula Bright testified as to her involvement with Petitioner Moates and his co-defendant Neely (whose case was reversed and remanded by the 4th Circuit on the issue of this Writ of Certiorari). There was no corroboration of what she said. She was given immunity for her testimony. (Trial Tr. I, pp. 85-87, 92-107)

Prior to Officer Atkins' testimony there was little evidence to support a jury conclusion of guilty beyond a reasonable doubt. Things changed.

Atkins testified that he began the investigation in March 1984, that he knows Sophia Floyd, that Ms. Floyd wanted a deal to help her boyfriend, who was confined, and as to what Ms. Floyd told him. Objections were over-ruled by the trial court who commented when counsel referred to *Bruton* v. *United States,* 391 U.S. 123 (1968), *"all right!* Do you (U.S. Attorney) want to reply?"

> *The Prosecutor:* "Well, Your Honor, if you've (already) made the ruling that it (these statements made to Atkins in his office as a paid informant) is in fact a statement of a co-conspirator, the rule (*Bruton, supra*) doesn't apply."
>
> *The Court:* "I follow you! I've already ruled. Bring them (the jury) in." (Trial Tr. I, 148-149)

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[3] The tape was not played; Galano said no deal was struck because the price was too high. Moates denied such a topic.

What followed is testimony beyond belief. Officer Atkins described Ms. Floyd as a confidential informant who told him that Moates had supplied her with cocaine as well as to a group of people. One of those supplied was co-defendant Neely. The jury heard that Moates had asked Neely to get a large sum of money for a cocaine deal that was "going down," that Neely sent Sophia Floyd to get it and that she did and the deal occurred. The jury heard of regular conversations with petitioner, one of which was for her to take a satchel full of money to the LaQuinta Motel. Thereafter, Moates and Floyd, per Atkins' hearsay, went to the motel and Moates went into a bathroom with a Cuban named Nelson and came out with a bag of cocaine and without the satchel of money. Atkins described conversations that Floyd had with Neely about why he was involved in the cocaine business with Moates. The jury heard how a Princess Brown was getting (6 to 7) grams of cocaine per week from Moates. Atkins then described how he dropped Ms. Floyd as an informant shortly thereafter because she had lied to him about whether she was still involved in the drug dealing at the time.[4] (Trial Tr. I, 152-158)

It is clear to anyone who reads the trial record that the evidence that caused petitioner's conviction was not the wiretap and proper police surveillance and evidence but the hearsay testimony of Detective Atkins attributing devastating remarks to Ms. Floyd, a co-defendant, about petitioner, which could not be confronted/cross-examined.

On June 18, 1987, the Fourth Circuit reversed and remanded the case as to Appellant Neely (who was serving

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[4] His evidence was Ms. Floyd denied it but the wiretaps picked her up as discussing meetings that she was denying.

a 32-year sentence) but affirmed as to Moates (Petitioner), Eire, Benae and Sophia Floyd.[5] The court concluded that the evidence admitted through Detective Atkins was totally improper. It held that since the only evidence as to Neely was three intercepted phone calls and those calls were explained through Atkins' decoding, based on Ms. Floyd's inadmissible statements out of court to Atkins, then there could be no harmless error.

Petitioner filed for a hearing *en banc* which was denied on August 4, 1987.

REASONS FOR GRANTING THE WRIT

This case presents a very basic question which this Court must address. That is where a trial is held and two alleged leaders of a conspiracy are damaged by clearly inadmissible hearsay evidence, there must be a new trial as to both (not one) because a jury cannot properly find criminal intent and knowledge where their minds are already contaminated by inadmissible hearsay evidence that denies the right to confrontation clause of the *United States Constitution.*

ARGUMENT

The legal profession adamantly believes that cross-examination is the primary interest secured by the confrontation clause. Former Chief Justice Burger wrote,

> ". . . (cross-examination) is the principal means by which the believability of a witness and the

[5] Clearly, the statements were admissible as to the declarant, though it should have been in a separate trial as *Bruton, supra,* requires. The hearsay statements as to Eire and Benae Floyd were harmless as they made no reference to either.

> truth of his testimony are tested." *Davis* v. *Alaska,* 415 U.S. 308, 316 (1974).

In *Chambers* v. *Mississippi,* 410 U.S. 284, 295 (1973), this Court held:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the Constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process. . ." It is, indeed, "an essential and fundamental requirement for the kind of a fair trial which is this country's Constitutional goal."

The error committed by the trial court in petitioner's case is frightening. How any federal judge can preside over a narcotics conspiracy trial and allow the prosecution to elicit testimony, offered for the truth of the matter asserted, based on what a co-defendant (on trial) said in the policeman's office about petitioner, while being paid as an informant and trying to win a boyfriend's release from jail is beyond comprehension! Any law student is familiar with *Bruton* v. *United States,* 391 U.S. 123 (1968). Ms. Floyd's remarks to Detective Atkins were not in the furtherance of a conspiracy; they were statements being sold for money to free a boyfriend. *Bruton* outlaws such an abuse of the confrontation clause.

To make matters worse, the Assistant United States Attorney argued at trial and before the 4th Circuit (to the disbelief of the panel) that Ms. Floyd's statements to Atkins were in the furtherance of the conspiracy and were reliable. Rule 801(d)(2)(e), *Federal Rules of Evidence,* and *United States* v. *Urbanik,* 801 F.2d 692 (4th Cir. 1986) make abundantly clear how egregious the error was in the instant case. *Urbanik, supra* was reversed where a co-defendant told his partner in crime, while lifting weights after the delivery of cocaine, that he could get his partner

any amount of drugs he wanted, anytime. The court reasoned, over Judge Russell's dissent,[6] that the statement made while lifting weights was after the criminal act, therefore not in furtherance of the conspiracy and should have been excluded as hearsay.

In its brief to the Fourth Circuit, the government conceded that Sophia Floyd was "a confidential informant" and that Atkins lifted her immunity because she had been lying to him about her involvement in drugs. (Appellee brief, p. 22) Such concessions best demonstrate why the courts view, *with great caution,* the information of an informant and why the confrontation clause is so crucial to the concept of due process.

This court held in *Dutton* v. *Evans,* 400 U.S. 784, 81 (1970), that out-of-court statements are inadmissible unless "in the furtherance of the conspiracy." The Fourth Circuit has found that Atkins' testimony was improper, not within *Dutton, supra* and reversed as to Neely but ruled harmless as to Petitioner. Such a finding is unfair, not supported by the trial record, contrary to *Urbanik, supra* and denies due process of law. Simply stated, what is fair and Constitutional is that statements offered by a witness while acting as a confidential informant to curry favor outside a conspiracy are just not admissible evidence. Any federal judge should know that and if he does not then one wonders why he should preside over such a trial. To allow the government a pass here based on such ignorance of the law or deliberate bad faith would be a miscarriage of justice. Petitioner received the brunt of the hearsay barrage; yet, he is serving 104 years in prison while Neely got a new trial. This is not fair.

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[6] Judge Russell clearly led the court from the bench in reversing the case as to Neely below.

The reasoning of the court in reversing and remanding the case as it applies to Neely is sound but is inconsistent with the facts as pertain to Petitioner. It is not harmless error. The Fourth Circuit could not have carefully reviewed the trial record; they could not have done so and reversed as to Neely and affirmed as to Moates. Counsel repeats; the bulk of Detective Atkins' hearsay remarks, attributable to Ms. Floyd, dealt with Petitioner Moates. There were wiretaps of Moates talking to others. Moates testified and explained what he was talking about and that his references were not about drugs but about his car cleaning business. He explained how he knew a Nelson Aguilar from hunting trips and why he had been to the LaQuinta Motel and left prior to any seizure of cocaine.[7] He did not know a deal was happening. Without Detective Atkins' testimony *re* Floyd's statements about Moates dealing over $162,000 cocaine with her, knowing a supplier of cocaine from Cuba named Nelson, doing a deal at the LaQuinta previously in her presence and Atkins' subsequent translation of the taped conversations of Moates, defining them as drug related there would have been no conviction of Petitioner. Atkins' testimony totally destroyed Moates and made his testimony laughable to a jury. Due process does not give Neely more of a right to confrontation than Moates. The trial judge's irrational ruling was horrible error and this Court should require the Solicitor General to justify the prosecutor's actions in deliberately offering such elementary error as testimony before the jury.

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[7] Moates barely knew Aguilar whom he had met when Aguilar passed through Woodruff on a hunting trip.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari has been served by mail upon the Honorable Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, and Samuel Rosenthal, Esquire, Appellate Section, Criminal Division, U.S. Department of Justice, P.O. Box 899, Washington, D.C. 20044; John W. McIntosh, Esquire, 1st Assistant United States Attorney, P.O. Box 2266, Columbia, South Carolina 29202.

Kenneth Michael Robinson

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5635

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

REYNIER EIRE — Defendant-Appellant

No. 86-5636

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

RICHARD WALTER NEELY, a/k/a Dickie — Defendant-Appellant

No. 86-5643

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

ARTHUR MOATES — Defendant-Appellant

No. 86-5644

UNITED STATES OF AMERICA Plaintiff-Appellee

v.

BENAE FLOYD Defendant-Appellant

No. 86-5648

UNITED STATES OF AMERICA Plaintiff-Appellee

v.

SOPHIA FLOYD Defendant-Appellant

Appeals from the United States District Court for the District of South Carolina, at Greenville. G. Ross Anderson, Jr., District Judge. (CR-86-92)

Argued: May 8, 1987 Decided: June 18,1987

Before RUSSELL and HALL, Circuit Judges, and VAN GRAAFEILAND, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

Stephen J. Henry; Kenneth M. Robinson; James R. Mann for Appellants; John W. McIntosh, Assistant United States Attorney (Vinton D. Lide, United States Attorney; William C. Lucius, Assistant United States Attorney; Marcia A. Mason, Third Year Law Student on brief) for Appellee.

PER CURIAM:

In this action five persons appeal their convictions for conspiracy to possess cocaine with intent to distribute, 21 U.S.C. § 846; using the telephone in furtherance of their illegal drug activities, 21 U.S.C. § 843(b); and possession of cocaine with intent to distribute, 21 U.S.C. 6⅜ 841(a)(1). The appellants contend that the court made numerous errors in the admission of evidence, that it improperly failed to sever the trial of one appellant, and that the trial judge erred in not disqualifying himself at one appellant's sentencing hearing. We find that testimony regarding the conversations between appellant Sophia Floyd and Detective Atkins was improperly admitted under the coconspirator rule, but that this admission was harmless except as to appellant Neely. We find the remaining charges of error to be without merit.

I.

This case concerns a cocaine distribution ring that operated in the Greenville-Spartanburg area of South Carolina. The cocaine was brought up from Florida by Nelson Aguilar and allegedly sold to appellant Arthur Moates, who arranged for local distribution. The Drug Enforcement Administration (DEA) and Greenville police began investigating the operation in March 1984. Two years later, on March 10, 1986, they obtained an order to intercept wire communications on two telephone lines in Moates' service station in order to uncover members of the conspiracy who had not been susceptible to discovery through other investigatory techniques. The order named seven individuals, including Aguilar, Moates, and appellant Neely, and "others as yet unknown." The wire interception began on March 10, 1986, and terminated on April 9,

1986. Tapes of 19 of these calls were later admitted into evidence.

Two of the appellants are sisters – Sophia Floyd and Benae Floyd. Benae Floyd was Moates' "number one girlfriend" and allegedly had no prior connection to any drug trafficking, although she had been questioned about others' drug activities in the past. Sophia Floyd, on the other hand, was at least on the fringes of this conspiracy because she knew of the others' illegal activities. In October 1985, in order to earn some money and enlist the help of the DEA in obtaining a transfer for her boyfriend who was then serving time for an unrelated drug charge, Sophia Floyd initiated a meeting with Detective Atkins and offered to become his confidential informant. In this posture she reported to Atkins at least once each week about the drug-related activities of Moates, Neely, and others. She did not implicate herself in these reports. Her relationship with Atkins terminated on March 13, 1986, when an intercepted conversation between Moates and Sophia Floyd revealed that she was not just an observer, but was also an active participant in the conspiracy.

On May 7, 1986, a grand jury returned a 22-count indictment against the appellants and others charging one count of conspiracy, twenty counts of using the telephone in furtherance of drug activities, and one count of posession of cocaine with intent to distribute. Three of the defendants – Aguilar, Galano, and Sullivan – entered guilty pleas and testified on behalf of the government. The appellants were convicted of all charges against them on August 28, 1986.

II.

Benae Floyd appeals her conviction on the ground that the only evidence of her participation in the drug traffick-

ing activities was contained in intercepted wire communications that should have been minimized. Benae Floyd was Moates' girlfriend and she apparently talked to him by telephone several times each day. She was not included in the affidavit used to obtain the wiretap, she had no prior record of drug trafficking, and she was not a target or under investigation at the time the wire interception began. She contends that because her conversations with Moates for the first three days of the interception were innocuous, the government had no basis for continuing to listen to her calls. Rather, she argues, the government was required to minimize her conversations under 18 U.S.C. § 2518(5):

> . . . . Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

The wire interception order in this case further specified:

> Even if one or more of the normal interceptees or their confederates, when identified is a participant in a conversation, monitoring will be suspended if the conversation is not criminal in nature or otherwise related to the offenses under investigation.

Despite the pattern of innocent conversations, the government continued to listen to Benae Floyd's calls and on March 13, 1986, they recorded a conversation implicating her in the drug activities.

In *United States v. Clerkley,* 556 F.2d 709 (4th Cir. 1977), *cert. denied,* 436 U.S. 930 (1978), we held that the government need not exclude all innocent conversations but must minimize unnecessary intrusions to the smallest

degree possible, invoking a standard of reasonableness on a case-by-case basis. *Id.* at 716. In analyzing a given case courts should consider (1) the nature and scope of the alleged criminal enterprise; (2) the government's reasonable expectation as to the content of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed. *Id.*

In the present case there is no allegation of insufficient judicial supervision. Benae Floyd merely argues that after three days of innocent conversation, the government had no reasonable expectation that she would begin talking about drugs. She further argues that although the government is afforded greater latitude when confronted with large narcotics conspiracies, *Clerkley* at 716, they still do not have carte blanche to engage in a fishing expedition.

Under the facts of this case we cannot say that the court abused its discretion in admitting these conversations. Benae Floyd had previously been questioned about unrelated drug activities, and this indicates a possible association with drug traffickers that reasonably gave the government additional time to evaluate the innocence of her intercepted conversations. Under such circumstances, the lapse of four days between the inception of the wiretap and the capture of an incriminating conversation was not excessive and did not violate the minimization requirement.

III.

The appellants next contend that the recordings of the intercepted conversations were obtained in violation of the fourth amendment and thus should have been suppressed. Specifically, they contend tha the affidavit supporting the intercept order failed to meet the requirements of 18 U.S.C. § 2518 because it did not give a "full and complete

statement" of prior investigatory efforts so as to show exhaustion of other modes of investigation. This contention is without merit. The government need not exhaust every conceivable technique before applying for a wiretap. *Clerkley* at 715. It may show either that traditional investigative techniques have been tried and failed, or it may show that they are unlikely to succeed. *Id.* The record shows that the government clearly did so in this case, explaining in sufficient detail the reasons why, after two years of probing into this drug ring, other investigatory techniques would be unsuccessful.

The appellants next raise a novel issue regarding the application of Fed. R. Evid. 801(d)(2)(E). Under this rule, the out-of-court statement of a conspirator is not hearsay when the statement was made during the course and in furtherance of the conspiracy, and thus may be used against his coconspirators. Based on this rule the court permitted Detective Atkins to testify about Sophia Floyd's out-of-court statements given to him when she was acting as a confidential informant. The appellants contend that Sophia Floyd's statements were hearsay and did not come within the exception of Rule 801(d)(2)(E) because, as a confidential informant for pay, she was not speaking in furtherance of the conspiracy when she talked to Atkins.[1] The record contains no analysis of the "in furtherance" requirement by the court below.

---

[1] This case must be distinguished from those in which a coconspirator who has become an informant talks to a third party in his or her guise as a member of the conspiracy. In these situations the efforts of the coconspirator to induce the third party to engage in intercourse with the conspiracy clearly would be in furtherance of the conspiracy and thus would be admissible under Rule 801(d)(2)(E).

Case law has consistently mandated that coconspirator statements be in furtherance of the conspiracy. *See United States v. Nixon,* 418 U.S. 683, 701 (1974); *Anderson v. United States,* 417 U.S. 211, 218 (1974); *Dutton v. Evans,* 400 U.S. 74, 81 (1970); *Wong Sun v. United States,* 336 U.S. 440, 443-44 (1949); *see also United States v. Urbanik,* 801 F.2d 692 (4th Cir. 1986). Although Model Code Rule 508(b) and Uniform Rule 63(9)(b) eliminated the traditional requirement that the coconspirator's statement be in furtherance of the conspiracy, the drafters of Rule 801(d)(2)(E) rejected this change and retained the "in furtherance" requirement. *See* 4 *Weinstein's Evidence* § 801(d)(2)(E)[01] at 801-233-34 (1985). Their purpose was to strike a balance between the need to use conspirators' statements to combat a kind of criminal activity that is inherently secretive, and the need to protect defendants against inadvertent misrepresentations or deliberately falsified evidence. Therefore, to be admissible, the statement must advance an object of the conspiracy rather than thwart its purpose. Courts interpreting this requirement have scrupulously excluded certain kinds of statements from the coconspirator exception: idle chit-chat, mere bragging, descriptive comments, and statements deliberately inculpating other conspirators and knowingly made to law enforcement agents. 4 D.W. Louisell & C.B. Mueller, *Federal Evidence* § 427 at 348 (1980). *See also Urbanik, supra.*

The government's theory in the present case is that Sophia Floyd's statements to Detective Atkins were made as part of a deliberate cover-up and thus furthered the conspiracy's objective of remaining in business. *See United States v. Fahey,* 769 F.2d 829 (1st Cir. 1985) (statement to FBI agent by coconspirator admissible if intended to mislead the agent); *United States v. Diez,* 515 F.2d 892 (5th Cir.

1975), *cert. denied,* 423 U.S. 1052 (1976) (statement to IRS agent by coconspirator admissible when the statement was "deceptive in design"). The problem with this theory by the government is that it is sheer speculation. The record is conspicuously devoid of any evidence of a cover-up. The only support the government can find for its position is the fact that Sophia Floyd initiated the relationship with Atkins and that she always avoided inculpating herself in her reports. Even under the most liberal interpretation of the "in furtherance" provision, Sophia Floyd's statements cannot be construed as furthering any objective of the conspiracy. There is no indication that she tried to lead the investigators away from the conspiracy. To the contrary, she led them *toward* the conspiracy and ultimately brought about its demise. Although she withheld information from Atkins about her own involvement in the conspiracy, this is run-of-the-mill behavior for police informants, and such withholding does not automatically convert otherwise reliable statements by informants into attempts to mislead or deceive the investigators.

Although we can find no factually similar case in any jurisdiction, our conclusion is in line with several other cases in which a coconspirator's statement was held inadmissible under Rule 801(d)(2)(E). *See, e.g., United States v. Lang,* 589 F.2d 92 (2d Cir. 1978) (statement to Secret Service agent by distributor of counterfeit bills that one of the distributor's previous customers [the defendant] had been arrested while possessing such bills did not advance any venture in which the defendant had an interest); *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976) (statement by coconspirator made in an effort to secure the release of a friend from prison did not further the conspiracy because the declarant "was working on a 'frolic' of his own"). Sophia Floyd's statements advanced only her

private interests, and were to the detriment of the other defendants.

Sophia Floyd's hearsay statements were used at trial against appellants Moates, Eire, and Neely. As to Moates and Eire the improper admission of the statements was harmless because there was overwhelming untainted evidence of their participation in the conspiracy and their use of the telephone in furtherance of illegal drug activities. *See United States v. Urbanik,* 801 F.2d 692 (4th Cir. 1986). As to appellant Neely, however, the improper admission requires that we grant him a new trial. The only other evidence presented against Neely was three intercepted telephone conversations that allegedly referred to drugs in code. Because the government sought to develop the meaning of the code at least in part by the use of information contained in the inadmissible statements, we cannot say that their admission was harmless as to him. This does not mean that on the retrial the government is foreclosed from developing, through other testimony, the meaning of the alleged code used in the intercepted conversations.

V.

Appellant Eire contends that the court erred in failing to sever his trial from that of the other defendants because he was not present during jury selection. Although Eire was advised of his right to be present at jury selection he apparently decided, after discussion with counsel, to remain in Florida during jury selection. Because of his absence the court ordered severance of his trial. After further discussing with counsel Eire moved to allow waiver of his presence at jury selection. The court questioned Eire closely, granted the motion to waive, and withdrew the severance. Eire now contends that the court erred in allowing him to waive this right and denying him a separate trial, but he

offers no cogent reason why the court erred. In *Parker v. United States,* 184 F.2d 488 (4th Cir. 1950), we held that the right to be present at jury selection is waivable except for capital offenses. The record shows that Eire's waiver was made intelligently, understandably, and knowingly, and thus the court's allowance of waiver was not erroneous.

VI.

Finally, appellant Neely argues that Judge Anderson erred in failing to disqualify himself at Neely's sentencing hearing. The presentence report revealed that Judge Anderson had represented Neely 18 or 21 years earlier while he was in private practice. Neely at that time had been accused of murder and, with counsel from Anderson, had agreed to plead guilty to manslaughter. Judge Anderson disclosed to both parties his prior representation of Neely and noted that he had no independent recollection of Neely or the case. Neely made no objection to Judge Anderson proceeding with sentencing. Given Judge Anderson's full disclosure, the absence of actual impropriety, and Neely's failure to request recusal, *see United States v. Sartori,* 730 F.2d 973 (4th Cir. 1984), we find no reversible error in Judge Anderson's failure to disqualify himself.

In summary, we affirm the judgments of convictions of appellants Moates, Eire, Benae Floyd, and Sophia Floyd. We vacate the judgment of conviction of appellant Neely and remand for a new trial.

AFFIRMED IN PART.
VACATED AND REMANDED
IN PART.